86-94

Supreme Court, U.S.
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CLERK

Case No.

SUPREME COURT OF THE UNITED STATES

ENTRY OF APPEARANCE

WAYNE ALVIN PIPKIN,

Appellant,

vs.

THE PEOPLE OF THE STATE OF COLORADO,

Appellee.

COMES NOW Allen J. Kincaid & Associates, Attorneys at Law, and respectfully enter their appearance on behalf of the Appellant, Wayne Alvin Pipkin, on all matters herein.

DATED this 18th day of July, 1986.

ALLEN J. KINCAID & ASSOCIATES

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EDITOR'S NOTE

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Case No.

SUPREME COURT OF THE UNITED STATES

TERM:

WAYNE ALVIN PIPKIN,

Appellant,

vs.

THE PEOPLE OF THE STATE OF COLORADO,

Appellee.

NATURE OF PROCEEDING: On appeal from the District Court, Arapahoe County, Colorado

TITLE OF DOCUMENT: Jurisdictional Statement

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COMES NOW the Appellant, Wayne Alvin Pipkin, by and through his attorneys, Allen J. Kincaid & Associates, and pursuant to Rules 12 and 15 of the Revised Rules of the Supreme Court of the United States provides the following Jurisdictional Statement:

A. QUESTIONS TO BE PRESENTED BY THE APPEAL

Whether §42-4-1202 of the Colorado Revised Statutes is unconstitutional because it contains a statutory presumption which interferes with the fact finder's responsibility at trial to find the ultimate facts beyond a reasonable doubt. The statute violates the due process clause of the Fourteenth Amendment which protects an accused against conviction except upon proof beyond a reasonable doubt of every fact necessary

to constitute a crime. The statute provides that if one's blood alcohol content is above a certain level that the person shall be presumed to be under the influence of alcohol.

Pipkin will raise three (3) other issues with his appeal, which issues would have had to have been presented under a writ of certiorari. One of the issues is whether Pipkin was denied his right to invoke the power of the court to compel the attendance of witnesses on his behalf. The Sixth Amendment to the United States Constitution provides for this right. Pipkin was denied a continuance of his trial when a crucial and material witness he subpoenaed failed to appear. Another issue is whether Pipkin was tried by a fair and impartial jury.

This right is also provided to Pipkin pursuant to the Sixth Amendment to the United States Constitution. One of the jurors during voir dire stated that she doubted that she could be fair and impartial. The juror was not excused for cause. The last issue regards the cross-examination of one of Pipkin's witnesses. The trial court allowed the prosecution to question this witness regarding certain alleged drug abuse even though that witness had not been convicted or charged of any such crime. Pipkin contends that this was in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

B. LIST OF PARTIES

The caption of this case contains the name of all the parties to the proceeding in the court whose judgment is

sought to be reviewed.

C. TABLE OF CONTENTS AND AUTHORITIES

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D. OPINIONS DELIVERED IN THE COURTS BELOW

The District Court, Arapahoe County, Colorado entered its opinion and ruling on January 28, 1986. A copy of the opinion and ruling is attached hereto as Appendix "A". The Supreme Court, State of Colorado entered its order denying Pipkin's Petition for Writ of Certiorari on April 7, 1986. A copy of the Order is attached hereto as Appendix "B".

E. STATEMENT OF GROUNDS FOR JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

Pipkin was charged with driving under the influence of intoxicating liquor and speeding 74 miles per hour in a 55 mile per hour zone on January 2, 1985. After a trial to jury, Pipkin was convicted of both offenses. Pipkin appealed his conviction of both offenses.

Pipkin appealed his conviction to the District Court, Arapahoe County, Colorado. Pipkin in his appeal argued that the driving under the influence of alcohol statute was unconstitutional because of a mandatory presumption contained in the statute. The District Court, Arapahoe County, Colorado entered its opinion and ruling holding the statute constitutional on January 28, 1986.

On February 27, 1986 Pipkin filed his Petition for Writ of Certiorari in the Supreme Court for the State of Colorado. This discretionary review by the Supreme Court of Colorado was denied on April 7, 1986. Under the law of the State of Colorado, Pipkin could not appeal any further, except to the Supreme Court of the United States. Pipkin filed his Notice of Appeal with the

District Court, Arapahoe County, Colorado on May 9, 1986. On May 7, 1986 a copy of the Notice of Appeal was filed with the County Court, Arapahoe County, Colorado because that court is possessed of the record. On or about May 27, 1986 an Amended Notice of Appeal was filed with the District and County Courts. See Appendix "C" and "C-1" attached hereto and incorporated herein.

The statutory provision which confers jurisdiction of this appeal to the Supreme Court of the United States is 28 USCS §1257(2). The District Court, Arapahoe County, Colorado held the statute constitutional over Pipkin's contention that it was repugnant to the due process clause of the Fourteenth Amendment. Pipkin contends that pursuant to Cox Broadcasting Corporation v. Cohn, 420 U.S. 469, 43 L.Ed.2d 328, 95 S.Ct. 1029 (1975) that the Supreme

Court of the United States has jurisdiction of this appeal and over any aspect of the case that would otherwise fall solely under certiorari jurisdiction. Pipkin respectfully requests that if the Court does not feel that the grounds are proper under appeal jurisdiction that the Court consider this document as a petition for writ of certiorari.

F. STATUTE CHALLENGED

Section 42-4-1202(2)(c) provides as follows:

> "If there was at such time 0.10 or more garms of alcohol per 100 milliliters of blood as shown by chemical analysis of such persons blood or if there was at such time 0.10 or more grams of alcohol per 210 liters of breath as shown by chemical analysis of such persons breath, it shall be presumed that defendant was under the influence of alcohol." (Emphasis added)

The entire statute has not been set out

verbatim because of its length. The entire statute is attached hereto and incorporated herein as Appendix "D".

G. STATEMENT OF THE CASE

Pipkin was convicted by a jury of six (6) persons in the County Court, Arapahoe County, Colorado of driving under the influence of alcohol on July 10, 1985. Jury Instruction No. 17 given to the jury provided as follows:

> "In any prosecution where the defendant is charged with driving under the influence of alcohol or driving while ability impaired, the amount of alcohol in the defendant's blood at the time of the commission of the alleged offense, or within a reasonable time thereafter as shown by chemical analysis of the defendant's blood or breath shall give rise to the following presumptions:
>
> (a) If there was at such time 0.05 or less grams of alcohol per 100 milliliters of blood as shown by chemical analysis of such persons blood or if there was at such time 0.05 or less

grams of alcohol per 210 liters of breath as shown by chemical analysis of such persons breath, it shall be presumed that the defendant was not under the influence of alcohol and his ability to operate a vehicle was not impaired.

(b) If there was at such time an excess of 0.05 but less than 0.10 grams of alcohol per 100 milliliters of blood as shown by chemical analysis of such person's blood or if there was at such time an excess of 0.05 but less than 0.10 grams of alcohol per 210 liters of breath as shown by chemical analysis of such persons breath, such facts shall give rise to the presumption that the defendant's ability to operate a vehicle was impaired by the consumption of alcohol, and such facts may also be considered with other competent evidence in determining whether or not the defendant was under the influence.

(c) If there was at such time 0.10 or more grams of alcohol per 100 milliliters of blood as shown by chemical analysis of such persons blood or if there was at such time 0.10 or more grams of alcohol per 210 liters of breath as shown by chemical analysis of such person's breath, it shall

be presumed that the defendant was under the influence of alcohol."

This jury instruction is taken directly out of §42-4-1202(2) C.R.S.. The State of Colorado at the trial introduced evidence that Pipkin's blood alcohol level was .121 grams of alcohol per 210 liters of breath. Pipkin in his notice of appeal filed with the County Court, Arapahoe County, Colorado set forth as one of his grounds for appeal that the statute under which he was convicted was unconstitutional because it violated the due process clause of the Fourteenth Amendment. This Notice of Appeal was then forwarded on to the District Court, Arapahoe County, Colorado. The County Court, Arapahoe County, Colorado did not rule on the issue since it was first raised in the appeal.

Once the Notice of Appeal and the record was forwarded to the District Court, Arapahoe County, Colorado the parties were required to file briefs in support of their positions. Pipkin in his opening brief contended that he was denied due process of the law by the application of the statutory presumption. Pipkin argued that the statutory presumption as given to the jury under Instruction No. 17 interfered with the fact finder's responsibility at trial, based on the evidence introduced by the State, to find the ultimate facts beyond a reasonable doubt. Pipkin contended that the presumption relieved the State of its burden of persuasion of beyond a reasonable doubt of every essential element of a crime. The District

Court, Arapahoe County, Colorado held the presumption a rebuttable presumption and thus the statute constitutional. The District Court entered its opinion and ruling on January 28, 1986.

On February 27, 1986 Pipkin filed his Petition for Writ of Certiorari with the Supreme Court of Colorado. Pipkin raised in his Petition for Writ of Certiorari that §42-4-1202 C.R.S. was unconstitutional because it denied him due process of the law by the application of a statutory presumption. Pipkin contended that the statutory presumption was a mandatory presumption thus making the statute unconstitutional. The Supreme Court of the State of Colorado refused to exercise its discretionary power to review the matter and denied Pipkin's Petition for Writ of Certiorari. The Supreme

Court of the State of Colorado refused to exercise its discretionary power to review the matter and denied Pipkin's Petition for Writ of Certiorari. The Supreme Court of Colorado entered its order denying the Petition for Writ of Certiorari on April 7, 1986.

On April 10, 1986 the District Court, Arapahoe County, Colorado entered its order vacating the stay previously entered and remanded the matter back to the County Court, Arapahoe County, Colorado for further proceedings. Pipkin then filed his Notice of Appeal with the District Court and a copy with the County Court. Pipkin believes that this Court has the discretion to address three (3) other issues previously raised. The first issue has to do with Pipkin's right to invoke the power of the court to

compel the attendance of witnesses on his behalf. The right to compel witnesses is given under the Sixth Amendment to the United States Constitution and the Colorado Constitution Article II, Section 16. The trial was initially set in this matter for June 10, 1985. On June 5, 1985 Pipkin forwarded to the Court a Motion to Continue. The grounds for requesting the continuance were that two witnesses could not be located and served. The continuance was granted and Pipkin signed a waiver of speedy trial.

On June 24, 1985 Dina M. Matz was served a subpoena for the trial commencing July 8, 1985 at 9:30 o'clock A.M.. Dina M. Matz failed to appear as required by subpoena. Prior to jury selection, Pipkin, through his counsel, moved for a continuance because Ms. Matz failed to

appear pursuant to subpoena. The trial court was informed that she would be unavailable to testify and that she was flying out of the State of Colorado. The Court was informed that it was this witness that ran tests on the second breath sample of Pipkin. The test on the second sample showed a thirty-five to forty percent variance from the first test. The People after Pipkin's request for a continuance stated as follows:

> "...but I feel it would be also somewhat unfair if Mr. Kincaid is not able to put on Dina Matz in this particular incident and I would not be objecting to a motion to continue on his part, provided, however, there is a waiver of speedy trial."

The People further provided as follows:

> "I feel when you subpoena a witness that he would have the right to expect that they can be here for a particular trial matter."

The court denied Pipkin's Motion to Continue. Pipkin, when asked whether or not he was ready to proceed to trial, informed the court, through his counsel, regarding his problem with his witness failing to appear. All of this took place prior to the jury selection process.

Pipkin again, after the jury selection, informed the court of the problem he was experiencing with the attendance of Dina M. Matz. Counsel for Pipkin tendered to the court a note given to him by the District Attorney's office wherein the witness informed everyone that she would not be able to attend as required by subpoena. Counsel informed the court that Dina Matz was an essential and crucial witness. No continuance was granted and the trial proceeded.

Another issue which was raised was whether or not Pipkin was tried by a fair and impartial jury. The Sixth Amendment to the United States Constitution provides that in criminal prosecutions a defendant is entitled to be tried by an impartial jury. One of the jurors called during the jury selection process was Barbara J. Decker. Mrs. Decker was a senior underwriter for an insurance company. Mrs. Decker, during the jury selection process, stated that she would have a problem with this type of case in light of her occupation. Mrs. Decker was asked the following question:

> "You don't really feel you could be fair and impartial do you?"

Mrs. Decker's answer to that question was:

> "I guess that is what I am saying..."

Pipkin requested that Mrs. Decker be ex-

cused for cause. The court denied this challenge for cause.

The last issue regards cross-examination of one of Pipkin's witnesses. Because the trial court denied Pipkin's motion for a continuance to require the attendance of Dina M. Matz as a witness, Pipkin was required to call one Dr. Wingeleth. Dr. Wingeleth was the employer of the witness Dina M. Matz. Prior to the trial commencing Dr. Wingeleth had made a public statement that he was abusing certain drugs. Pipkin requested the court to enter an order that the People not be allowed to inquire into any drug use by Dr. Wingeleth. The court at that time ruled that the matter would have to be taken up in camera. Pipkin again raised this motion in limine regarding references to such activities.

During the course of trial when the People attempted to bring up Dr. Wingeleth's drug problem Pipkin objected. Dr. Wingeleth had not been convicted of any offenses involving drug use or even charged with such offenses. The People were allowed to question Dr. Wingeleth regarding his public statement whether or not he had been abusing drugs for the past couple of months and that his heaviest drug abuse occurred during March and April of 1985.

H. REASONS WHY QUESTIONS PRESENTED ARE SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION

Section 42-4-1202 C.R.S. is the Colorado statute which defines and sets forth the offense of driving under the influence of alcohol. When a blood alcohol test is obtained the presumption

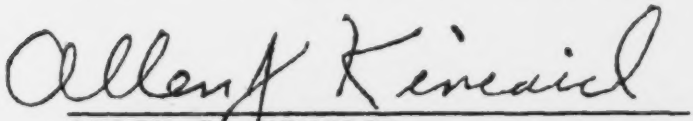
set forth under the statute is used in the prosecution of all such offenses. The presumption violates the due process clause of the Fourteenth Amendment and concerns the federal constitutional rights of every individual charged in Colorado with such an offense.

The other issues raised also address fundamental constitutional rights of criminal defendants. The trial court on these other issues violated Pipkin's fundamental rights and deprived him of a fair trial. Pipkin was denied his constitutional right to compel the attendance of witnesses when the trial court denied his motion for continuance. Pipkin was further denied his constitutional right to a fair and impartial jury when the trial court denied his challenge for cause of one of the jurors who stated

she could not be fair and impartial. The improper cross-examination of Dr. Wingeleth denied Pipkin of a fair trial. The District Court, Arapahoe County, Colorado upheld these rulings by the trial court in violation of Pipkin's constituional rights. The rulings and holdings by the trial court and appeal court below denied Pipkin a fair trial.

Respectfully submitted,

ALLEN J. KINCAID & ASSOCIATES



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CERTIFICATE OF MAILING

This is to certify that I, the undersigned, have placed a true and

correct copy of the foregoing Jurisdictional Statement in the United States Mail, first-class postage prepaid, this 18th day of July, 1986, addressed to the following:

Robert R. Gallagher, Jr.
District Attorney
2100 West Littleton Boulevard
Littleton, Colorado 80120

Allen J. Kincaid

DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO

Case No. 85 CR 593, Division 2

OPINION AND RULING

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee,

v.

WAYNE ALVIN PIPKIN,

Defendant-Appellant.

THIS MATTER came on for consideration of an appeal from the County Court of Arapahoe County, the defendant-appellant appearing by Edward W. Pabst and the plaintiff-appellee appearing by the District Attorney.

The Court had considered the record certified to the Court and the briefs of the parties. Now being advised in the premises, the Court issues the following:

OPINION

The defendant (appellant herein) was charged by summons and complaint issued by the Colorado state patrol with driving 74 M.P.H. in a posted 55 M.P.H. zone and with driving a vehicle while under the influence of intoxicating liquor.

Trial was in the County court to a jury. The jury convicted the defendant of both offenses. The defendant then commenced this appeal.

The defendant raises the following arguments:

1. The trial court erred in failing to suppress statements made by the defendant.

   The vehicle operated by the defendant was observed on radar by the state patrolman as speeding at 74 M.P.H. After the patrolman approached the

vehicle and smelled a strong odor of alcoholic beverage on the defendant's breath. The patrolman advised the defendant that the defendant was speeding 74 M.P.H. in a posted 55 M.P.H. zone and that the patrolman smelled a strong odor of alcoholic beverage on the defendant's breath. The defendant responded that he had had three or four beers, but wasn't drunk.

The defendant moved to suppress the response of the defendant. He urges that the advisement of the patrolman was custodial interrogation and that the defendant was not advised of his Miranda rights. The defendant, sitting in his own vehicle, was not in custody when the patrolman, who was conducting an investigatory stop,

advised the defendant of the reasons for which the defendant had been stopped and a Miranda advisement, under the totality of the circumstances, was not required, People v. Mares, 705 P.2d 1013 (Colo. App. 1985), People v. Johnson, 671 P.2d 958 (1983).

2. The patrolman did not have probable cause to request that the defendant submit to a roadside sobriety test. The patrolman requested that the defendant submit to a roadside sobriety test. The defendant said, "Do what you have to do. (T.p.21) He also stated that "he wanted to cooperate" (T.p.37).

A defendant waives his right to constitutionally challenge a search, i.e. a roadside sobriety test, if he

voluntarily does consent to the search, People v. Bowman, 669 P.2d 1369, 1377 (1983), People v. Helm, 633 P.2d 1071 (1981).

The responses of the defendant manifest his consent to the roadside sobriety test. The trial court found that the defendant voluntarily consented to the roadside sobriety tests. The denial by the trial court of defendant's motion to suppress was proper.

3. The trial court abused its discretion when it denied the defendant's motion to continue the trial on the grounds that a defense witness failed to appear at the trial.

The defendant sought a continuance of the trial for the reason that a witness subpoenaed, that she had another

commitment out of town and that she would not appear at defendant's trial. Defense counsel moved for the continuance after conclusion of the suppression hearing that was conducted by the trial court prior to jury selection.

The subject of the testimony of the witness was an independent test of a second breath sample of the defendant that had been performed by the witness. A witness, who supervised the performance of the test of the second sample, testified for the defendant. The second test result was admitted into evidence at the trial. The defendant has failed to show that the defendant sustained any prejudice by the denial of his motion for a continuance of the trial. The

defendant has failed to demonstrate that the trial court abused its discretion, Miller v. People, 178 Colo. 397 (1972).

4. The trial court abused its discretion in failing to excuse a prospective juror for cause.

The defendant challeged a prospective juror for cause. The challenge was denied by the trial court. The defendant contends that the juror indicated on voir dire that she could not be fair and impartial in view of her occupation as an insurance underwriter. The record of the voir dire of the prospective juror reveals that she would be fair and impartial in the case (t.pp.85 through 89.)

The defendant has failed to show the trial court abused its discretion,

when it denied the challenge of the defendant for cause, People v. Ward, 673 P.2d 47(Colo. App. 1983).

5. The trial court committed error in permitting the prosecution to cross-examine a defense witness on the subject of drug abuse by the witness. Over the objection of the defendant, the witness, who had supervised a test of the second sample of the defendant's breath, was cross-examined by the prosecution on the subject of abuse of drugs by the witness during the span of time that the test of the second breath sample was conducted.

The admissibility of evidence of specific instances of conduct of a witness that relates to credibility of the witness is within the sound